96TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 96–
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INTELLIGENCE IDENTITIES PROTECTION ACT

SEPTEMBER 4, 1980.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. EDWARDS of California, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING AND ADDITIONAL VIEWS

[To accompany H.R. 5615]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5615) to amend the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain U.S. intelligence officers, agents, informants, and sources, having considered the same, report favorably thereon without amendment and recommend that the bill, as amended by the Permanent Select Committee on Intelligence, do pass.

INTRODUCTION

Part 1 of this report [1] contains a discussion of the background of and need for this legislation. Part 2 will focus on those portions of the bill within the Committee's jurisdiction and those issues to which the Committee gave particular attention.

The Committee concurs in the need to keep secret the identities of our covert intelligence agents serving abroad. The exposure to harm of individuals who are performing a delicate and dangerous task in hostile foreign countries, beyond the protection of the law and the police power of the United States, must be minimized. When risk is magnified by exposure for its own sake, it has no legitimate purpose. When based on access to classified information obtained while serving as an employee of the United States, such disclosures are a betrayal of

[1] Rept. 96–1219 Part 1, filed Aug. 1, 1980.

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trust. Accordingly, the Committee concurs in the placing of greater penalties on those who have failed to abide by their promise not to disclose classified information.

The Committee is concerned, however, about the danger inherent in any criminal statute aimed at individuals who publish information based upon data that has not been classified or which has otherwise found its way into the public domain. Accordingly, the Committee concurs in the Intelligence Committee's efforts to narrow that section of the bill which criminalizes some such disclosures (section 501(c)). The Committee does not intend to adversely affect First Amendment rights, but it acknowledges that some doubt remains. For that reason Part II of this report will try to clarify some of the lingering questions.

History

H.R. 5615 was referred to the House Committee on the Judiciary on August 18, pursuant to clause 5 rule X, for a period ending not later than August 26, 1980, for consideration of such provisions of the bill and amendments as fall within its jurisdiction under clause 1(m) rule X. An extension of the referral was granted for an additional four legislative days, ending September 4, 1980.

The referral was made at the request of the Chairman of the House Committee on the Judiciary in a letter to the Speaker of the House of Representatives dated July 28, 1980. In this letter, the Chairman noted that the bill contained several provisions falling within the jurisdiction of the Committee, including coverage of certain employees, informants and sources of the Federal Bureau of Investigation, both outside the United States and within this country. The Chairman stated that "because the Judiciary Committee has jurisdiction over the FBI, and over intelligence matters within the United States," the Committee should have an opportunity to review H.R. 5615. The Chairman also requested referral on the ground that there is "an important First Amendment dimension to the bill" which falls within the jurisdiction of the Committee.

Hearings were held by the Subcommittee on Civil and Constitutional Rights on August 19 and 20. At those hearings the following witnesses testified:

Robert Keuch, Associate Deputy Attorney General, Department of Justice; Floyd Abrams, Esq., Cahill, Gordon & Reindel, New York, N.Y.; Hon. Jim Wright, Hon. Robert McClory, Hon. Les Aspin, Members of Congress; Ford Rowan, associate professor, Northwestern University and, attorney, Sanford, Adams, McCullough & Beard; Robert Lewis, chairman, Society of Professional Journalists, Sigma Delta Chi, (also speaking on behalf of the Association of Americans Publishers and the National Newspapers Association).

On August 26, 1980, the Subcommittee met to consider H.R. 5615, made amendment thereto, and by a vote of six yeas ordered the bill as amended reported to the full Committee as a substitute to the Intelligence Committee's bill. During the Subcommittee's consideration of the bill, three amendments were adopted: (1) Section 501(c) was deleted; (2) All coverage of the FBI employees, informants and sources was deleted; and (3) A defense was added to section 502 for those instances in which a covert agent identified himself.

On September 3, 1980, the full Committee met to consider the Intelligence Committee amendment in the nature of a substitute and the Subcommittee substitute. The Committee rejected the Subcommittee substitute by a vote of 9 yeas to 18 nays. The Committee then had before it the Intelligence Committee bill. Several amendments were offered to the Intelligence Committee bill. An amendment was offered creating a defense under section 502 that the information disclosed under 501(c) was from other than classified sources. This amendment was defeated by a vote of 8 yeas and 21 nays. An amendment was offered to delete from the definition of covert agent in section 506, those FBI informants and sources who serve within the United States. The amendment was defeated by a vote of 8 yeas to 21 nays. A quorum being present, the Committee then adopted the bill as amended by the Intelligence Committee amendment in the nature of a substitute by a vote of 21 yeas to 8 nays and ordered it reported favorably to the House.

Explanation of Committee Consideration

The Committee rejected the Subcommittee substitute and restored the bill to the version originally reported by the House Permanent Select Committee on Intelligence and referred to the House Committee on the Judiciary. The bill differs from the introduced bill in the following major respects:

The introduced bill created two new criminal offenses. The first was designed to apply to employees and former employees who had authorized access to classified information and who violated their position of trust in identifying intelligence agents, employees, informants and sources whose identities or intelligence relationships to the United States were classified. The second offense was aimed at anyone else who disclosed any information identifying the protected individuals, regardless of the source or classified nature of the information, but made with the intent to impair and impede the foreign intelligence of the United States.

The reported bill creates three criminal offenses: two affecting individuals having access to classified information and one affecting all others. The distinction between the two offenses affecting individuals having access to classified information centers on the difference in the position of trust assumed between the two sets of offenders. The Committee concurs in that distinction.

The third class was narrowed considerably in response to concerns about its impingment on First Amendment activity. Although section 501(c) still seeks to punish individuals who disclose identities without having had access to classified information, the reported bill now requires that not only must the specific disclosure be made with "the intent to impair or impede the foreign intelligence activities of the United States," but also be part of a continuing effort to expose covert agents. The ongoing effort must itself have been undertaken with "the intent to impair or impede" foreign intelligence activities. It is the Committee's understanding that this language—"in the course of an effort"—is intended to be substantially similar to the meaning of the pattern of activity language in the Senate bill, S. 2216.

The Intelligence Committee amendment in the nature of a substitute also adds certain FBI employees, sources and informants to those in-

dividuals whose identities are protected by this legislation. The FBI employees covered fall in a very narrow category of covert foreign counter-inteligence and covert foreign counter-terrorism agents who travel abroad for specific undercover assignments. Although their trips outside the United States may be few and of short duration, the same rationale applies to them as to the covert CIA employees covered by the bill while serving abroad: These individuals are outside the protection of American law and police power, operating in a hostile environment where exposure may lead to physical harm. In that capacity FBI employees are, under this legislation, entitled to the same protection as CIA employees. The legislation is not intended to extend to any other FBI employees, including covert foreign counter-intelligence and covert foreign counter-terrorism agents while serving within the United States.

Summary of Legislation

Disclosure of information harmful to the national security is a crime under the espionage laws, 18 U.S.C. §§ 793–798. It is the position of the Justice Department and the Administration that "knowing disclosure of the identity of a covert intelligence agent or source of the CIA or a foreign intelligence component of the Department of Defense knowingly based on classified information constitutes a violation of the current espionage statutes found in title 18, section 793(d) and (e)." [2] Nevertheless, the Administration supports the enactment of a statute specifically dealing with the disclosure of covert identities as "an aid to effective law enforcement because the government will be able to avoid several hurdles which exist in prosecutions brought under the present espionage statutes." [3]

In reporting H.R. 5615, the Committee concurs in the utility of such legislation aimed at the knowing disclosure of certain very limited types of classified information. Normally, the espionage laws do not speak in terms of disclosure of classified information, but rather, speak in terms of disclosure of information related to the national defense. The criteria for classification under the current controlling Executive Order 12065 are broader than the criteria necessary to show relatedness to the national defense under the espionage laws. Thus, the fact of classification would not be dispositive in an espionage case. Rather it would be one factor among others tending to establish relatedness to the national defense.

Obviously, in demonstrating harm to the national defense, it may be necessary to reveal additional sensitive information. Thus, the Justice Department and the intelligence community are concerned that in proving harm, additional harm is often done. For this reason, the Administration has come forward to recommend a stricter form of liability in this bill, by supporting criminalization of the disclosure of information relating to a classified intelligence identity or intelligence relationship to the United States.

In certain very limited situation in the past, the Congress and the courts [4] have supported the view that disclosure of classified informa-

[2] Testimony of Robert L. Keuch, Associate Deputy Attorney General, before the House Permanent Select Committee on Intelligence, Jan. 30, 1980, p. 29.
[3] *Ibid.*
[4] See e.g. *Scarbeck* v. *U.S.*, 3; 7 F.2d 546 (D.C. Cir. 1962).

tion itself can be criminal. However, in enacting such legislation, Congress has been careful to limit either the type of information protected (as in cryptographic systems in 18 U.S.C. § 798), the individuals who are prohibited from disclosing information, (for example, government employees in 50 U.S.C. § 783(b)), or the recipients of the disclosure (again as in 50 U.S.C. § 783 prohibiting disclosures to foreign agents or Communist organizations). There is no equivalent of an Official Secrets Act, aimed at *any* unofficial disclosure of classified information.

In the Committee's opinion, H.R. 5615 falls within that narrow category of cases, by focusing on one type of classified information—the identity of certain intelligence agents and the intelligence relationship to the United States of certain informants and sources. The Committee assumes that, given the sensitive and often dangerous tasks performed by these individuals, the classified status of their relationships to our government would in most cases be proper. Nevertheless, the Committee takes note of the concern expressed in recent years that classification is overused or abused by the Executive Branch.[5] To give the Executive Branch unreviewable power to invoke a prohibition on the communications of everyone, even as to a very narrow category of information, is of doubtful wisdom.[6]

Accordingly, the Committee emphasizes its view that such classification be proper in order to fall within the protection of this statute. In emphasizing this point, the Committee's concern is less with the technical steps to be followed before a stamp of "top secret" can be placed on a document, than it is with the requirement that the classification must be, in fact, in the interests of national security.

Limiting the bill to the narrow category of certain classified identities and relationships helps bring the bill within constitutional bounds. It is clear from the record however, that classification of these identities and relationships alone has not been adequate to prevent exposure. Indeed, according to the CIA, the root of the problem is that

> because of the disclosure of sensitive information based on privileged access and made by faithless government employees with the purpose of damaging U.S. intelligence efforts * * * the public has become aware of indicators in these documents that can sometimes be used to distinguish CIA officers.[7]

That same witness went on to say that one publication which often prints lists of CIA agents is

> a regurgitation from some compendium * * * Others could * * * be taken from reports or others kinds of documents that may have been in unclassified context * * * In short, what they are taking it from is a garden variety biographical compendium. They are saying this is past history, but presently he is the CIA station chief in country X.[8]

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[5] See e.g. Edgar and Schmidt, "The Espionage Statutes and Publication of Defense Information," 73 Columbia L. Rev. 929 (1973), p. 1066.

[6] *Ibid.*

[7] Testimony of Frederick P. Hitz, Legislative Counsel, Central Intelligence Agency, before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, Aug. 19, 1980.

[8] Ibid.

There are two points to be made here. First, if cover is as easily penetrated as the record appears to indicate, then the primary burden must be on the Executive branch generally, and the intelligence community is particular, to remedy this situation. Accordingly, the Committee notes with approval the language in section 503 directing the President to establish procedures to ensure that the identity of undercover officers and employees are effectively concealed. It is not the Committee's intent in approving this legislation to shield the intelligence community from its own careless procedures by punishing those who publish what is known or publicly available but still technically classified.

Second, the possibility of the public availability of information identifying the protected individuals raises the question of what it means to "disclose" any information identifying a covert agent. Webster's New Collegiate Dictionary defines "disclose" as follows: "to expose to view * * * to make known or public (something previously held close or secret)." Although the Justice Department has taken the position that the statute criminalizes not only the first, but the second, third, and all subsequent disclosures, the Committee believes that an interpretation pertaining to all subsequent disclosures goes beyond the logical meaning of the term "disclose." The harm this bill is designed to protect against is done as soon as an identity is widely known or notorious—that is, no longer "held close or secret." To punish each subsequent disclosure or republication, no matter how well known the information, serves little, if any, public interest, and reaches so broadly into areas of protected First Amendment activity as to be constitutionally insupportable.

Another area calling for clarification centers on the meaning of the word "identify." Much of the testimony focused on the actual naming of names in explaining the need for the legislation. The bill itself, however, prohibits the disclosing of "any information which identifies" a covert agent. The bill does not define the word "identify." Information describing a person's position or location may identify him as an agent or help the next person to identify him. A careful, responsible journalist may be hard put to know when the line to identification has been crossed.[9] The Committee is concerned about the effect this may have on vigorous investigative journalism. It is the Committee's opinion that while "identify" need not mean "naming the name," it must be more than evidence which, in conjunction with other, nondisclosed facts, would lead inevitably to the selection of the individual covert agent. The common dictionary definition of "identify" is "to establish the identity of," and the Committee believes it to be the correct definition in this case.

Oversight Findings

With respect to clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the committee notes that it has conducted

[9] See testimony of Ford Rowan, Visiting Associate Professor of Journalism, Northwestern University, and attorney, Sanford, Adams, McCullough and Beard, before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Aug. 20, 1980.

both public hearings and executive briefings on the ability of the United States to keep secret the identities of its undercover intelligence officers and agents. The committee findings in this area have resulted in its recommendation that new legislation (H.R. 5615) be enacted. The committee's reasoning is set out in the body of this report.

Congressional Budget Act

Pursuant to clause 2(l) (3) (B) of rule XI of the Rules of the House of Representatives, the committee notes that this legislation does not provide for new budget authority or tax expenditures.

Congressional Budget Office Estimate

Pursuant to clause 2(l) (3) (C) of rule XI of the Rules of the House of Representatives, the committee received an estimate from the Congressional Budget Office under section 403 of the Congressional Budget Act. The Congressional Budget Office expected that no additional cost to the Government will be incurred as a result of this legislation and that no significant revenues will be received.

Recommendation of the Committee on Government Operations

Pursuant to clause 2(l) (3) (D) of rule XI of the Rules of the House of Representatives, the committee notes that it has not received a report from the Committee on Government Operations.

Inflation Impact Statement

Pursuant to clause 2(l) (4) of rule XI of the Rules of the House of Representatives, the committee finds that enactment of H.R. 5615 will have no inflationary impact on prices or costs in the operation of the national economy.

Committee Cost Estimate

Pursuant to clause 7(a) (1) of rule XIII of the Rules of the House of Representatives, the committee has determined that no measurable additional costs will be incurred by the Government in the administration of H.R. 5615.

U.S. Congress,
Congressional Budget Office,
Washington, D.C., September 4, 1980.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives,
Rayburn House Office Building, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 5615, the Intelligence Identities Protection Act, as ordered by the House Committee on the Judiciary, September 3, 1980.

The bill establishes fines of $15,000 to $50,000 for intentional disclosure of information identifying covert agents. The bill also directs the President to establish procedures to ensure that these identities are effectively concealed. Based on information from the Central Intelligence Agency, it is expected that no additional costs to the federal government will be incurred as a result of this legislation. While it is not possible to estimate the potential revenue from fines, it is expected that few violations of this bill will occur, and that no significant revenues will be received.

Sincerely,

ALICE M. RIVLIN,
Director.

EXECUTIVE BRANCH ESTIMATES

The committee has received no cost estimates from the executive branch and is therefore unable to compare the Government's cost estimates with it own estimates pursuant to clause 7(a)(2) of rule XIII of the Rules of the House of Representatives.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in roman):

NATIONAL SECURITY ACT OF 1947

AN ACT To promote the national security by providing for a Secretary of Defense; for a National Military Establishment; for a Department of the Army, a Department of the Navy, and a Department of the Air Force; and for the coordination of the activities of the National Military Establishment with other departments and agencies of the Government concerned with the national security

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

That this Act may be cited as the "National Security Act of 1947".

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TITLE V—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

DISCLOSURE OF IDENTITIES OF CERTAIN UNITED STATES UNDERCOVER INTELLIGENCE OFFICERS, AGENTS, INFORMANTS, AND SOURCES

SEC. 501. (a) Whoever, having or having had authorized access to classified information that identifies a covert agent, intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $50,000 or imprisoned not more than ten years, or both.

(b) Whoever, as a result of having authorized access to classified information, learns the identity of a covert agent and intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $25,000 or imprisoned not more than five years, or both.

(c) Whoever, in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States, discloses, with the intent to impair or impede the foreign intelligence activities of the United States, to any individual not authorized to receive classified information, any information that identifies a covert agent knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

DEFENSES AND EXCEPTIONS

SEC. 502. (a) It is a defense to a prosecution under section 501 that before the commission of the offense with which the defendant is charged, the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution.

(b)(1) Subject to paragraph (2), no person other than a person committing an offense under section 501 shall be subject to prosecution under such section by virtue of section 2 or 4 of title 18, United States Code, or shall be subject to prosecution for conspiracy to commit an offense under such section.

(2) Paragraph (1) shall not apply in the case of a person who acted in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States.

(c) In any prosecution under section 501(c), proof of intentional disclosure of information described in such section, or inferences derived from proof of such disclosure, shall not alone constitute proof of

intent to impair or impede the foreign intelligence activities of the United States.

(d) It shall not be an offense under section 501 to transmit information described in such section directly to the Select Committee on Intelligence of the Senate or to the Permanent Select Committee on Intelligence of the House of Representatives.

PROCEDURES FOR ESTABLISHING COVER FOR INTELLIGENCE OFFICERS AND AGENTS

SEC. 503. (a) The President shall establish procedures to ensure that any individual who is an officer or employee of an intelligency agency, or a member of the Armed Forces assigned to duty with an intelligence agency, whose identity as such an officer, employee, or member is classified information and which the United States takes affirmative measures to conceal is afforded all appropriate assistance to ensure that the identity of such individual as such an officer, employee, or member is effectively concealed. Such procedures shall provide that any department or agency designated by the President for the purposes of this section shall provide such assistance as may be determined by the President to be necessary in order to etablish and effectively maintain the secrecy of the identity of such individual as such an officer, employee, or member.

(b) Procedures established by the President pursuant to subsection (a) shall be exempt from any requirement for publication or disclosure.

EXTRATERRITORIAL JURISDICTION

SEC. 504. There is jurisdiction over an offense under section 501 committed outside the United States if the individual committing the offense is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act).

PROVIDING INFORMATION TO CONGRESS

SEC. 505. Nothing in this title shall be construed as authority to withhold information from Congress or from a committee of either House of Congress.

DEFINITIONS

SEC. 506. For the purposes of this title:

(1) The term "classified information" means information or material designated and clearly marked or clearly represented, pursuant to the provisions of a statute or Executive order (or a regulation or order issued pursuant to a statute or Executive order), as requiring a specific degree of protection against unauthorized disclosure for reasons of national security.

(2) The term "authorized", when used with respect to access to classified information, means having authority, right, or permission pursuant to the provisions of a statute, Executive order, directive of the head of any department or agency engaged in foreign intelligence or counterintelligence activities, order of a United States court, or provisions of any Rule of the House of Representatives or resolution of the Senate which assigns re-

sponsibility within the respective House of Congress for the oversight of intelligence activities.

(3) The term "disclose" means to communicate, provide, impart, transmit, transfer, convey, publish, or otherwise make available.

(4) The term "covert agent" means—

(A) an officer or employee of an intelligence agency, or a member of the Armed Forces assigned to duty with an intelligence agency—

(i) whose identity as such officer, employee, or member is classified information, and

(ii) who is serving outside the United States or has within the last five years served outside the United States;

(B) a United States citizen whose intelligence relationship to the United States is classified information and—

(i) who resides and acts outside the United States as an agent of, or informant or source of operational assistance to, an intelligence agency, or

(ii) who is at the time of the disclosure acting as an agent of, or informant to, the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation; or

(C) an individual, other than a United States citizen, whose past or present intelligence relationship to the United States is classified and who is a present or former agent of, or a present or former informant or source of operational assistance, to, an intelligence agency.

(5) The term "intelligence agency" means the Central Intelligence Agency, the foreign intelligence components of the Department of Defense, or the foreign counterintelligence or foreign counterterrorist components of the Federal Bureau of Investigation.

(6) The term "informant" means any individual who furnishes information to an intelligence agency in the course of a confidential relationship protecting the identity of such individual from public disclosure.

(7) The terms "officer" and "employee" have the meanings given such terms by sections 2104 and 2105, respectively of title 5, United States Code.

(8) The term "Armed Forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(9) The term "United States", when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

DISSENTING VIEWS OF MESSRS. PETER W. RODINO, JR., DON EDWARDS, ROBERT W. KASTENMEIER, JOHN SEIBERLING, ROBERT F. DRINAN AND ELIZABETH HOLTZMAN

We feel strongly that the officers, employees and sources that operate covertly on behalf of American foreign intelligence must be protected from harm and exposure. We share the alarm of our colleagues arising from their callous and irresponsible disclosure of names of covert agents. However, we believe that the goal of maintaining secrecy and minimizing risk of harm can be achieved by less onerous means than the Committee bill. The bill as reported by the Subcommittee, in conjunction with improved secrecy and cover procedures to be devised by the President, would have accomplished this goal.

Constitutional Issues

SECTIONS 501(A) AND (B)

Sections 501(a) and (b) of H.R. 5615 would make it a crime for a person who learned the identity of covert agents through authorized access to classified information to knowingly reveal that identity to an unauthorized person. These sections raise no serious constitutional objections. The government has a right to protect classified information and to place special obligations on those officials entrusted with classified information. There is a choice to be made on the part of the individual to accept the responsibilities associated with seeing classified material or to reject the opportunity to see classified material in order to preserve full opportunities to speak on all matters.[1]

SECTION 501(C)

This section is aimed primarily at private citizens and the press who gain knowledge of agent identities from either public or classified sources. In both instances, First Amendment interests are compromised.

1. Application to Non-Classified Sources

Section 501(c) prohibits publication of identifying information even if the reporter or private individual derived the identity or

[1] On the other hand, there remains the question of whether a criminal sanction is needed or is preferable to the already existing remedies available through civil proceedings. In *U.S.* v. *Snepp* —— U.S. —— (1980). The Supreme Court not only upheld the enforcibility of the pre-publication review requirement contained in contractual agreements of past and present CIA employees, but also sanctioned the use of pre-publication censorship in the absence of an explicit agreement. Furthermore, the remedy sanctioned by the court for breaches (a constructive trust on the author's earnings) will provide a powerful incentive to submit to the review process. In our opinion, as well as that of many witnesses heard by this Committee and the House Select Intelligence Committee, broad prepublication censorship currently available under *Snepp* is more destructive of First Amendment interests than the criminal sanction.

identities wholly from public sources. This includes disclosures based upon inferences drawn from the government's own non-classified documents; it includes the publication of "common knowledge" as to who is a CIA agent or source in a particular area; it includes the revelation by an organization, (such as a missionary church, newspaper, or university) based on its own internal investigation, that some of its members—contrary to the organization's policy—have acted as sources for the CIA;[2] it includes republication of disclosures made by others. The limit on how "public" this information must be before prosecution will is left to the discretion of political appointees.

In testimony before the House Intelligence Committee, Deputy Assistant Attorney General Robert L. Keuch, speaking for the Justice Department, accurately and succinctly summed up the decisions of the courts on the question of whether such disclosure can be criminal. These decisions hold that no one can be convicted of espionage or of compromising information relating to the national defense

> * * * if the information was made available to the public, or if the government did not attempt to restrict its dissemination or if the information was available to everyone from lawfully accessible sources.

The case directly on point is the widely quoted opinion of Judge Learned Hand in *U.S.* v. *Heine*, 151 F. 2d 813 (1945). Heine engaged in an activity very similar to that which appears to have given rise to section 501(c). In the words of Judge Hand:

> [T]he information which Heine collected was from various sources: ordinary magazines, books and newspapers; technical catalogues, handbooks and journals; * * *. This material he condensed and arranged in his reports * * *. All this information came from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift, and collate it.

No appreciable public interest is served by criminalizing the disclosure of information already in the public domain. As the experience in the ill-fated *Progressive* case demonstrates, the publicity that follows prosecution only heightens public awareness of the information.

2. Classified information

Except with respect to limited, and highly technical areas, heretofore, the law has been clear that freedom of the press includes the right to gather and report the news even if the news is from classified sources. *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). Only twice in our history has Congress legislated a prohibition on the right of the press to publish classified information: a narrow prohibition on publishing codes, 18 U.S.C. § 798 and highly sensitive atomic energy information, 42 U.S.C. § 2274. Both involve highly technical information which minimally restrict the flow of news. When broader categories of information have been involved, such as when Congress considered and enacted the current espionage laws, Con-

[2] See, for example the Sept. 12, Sept. 13, and Dec. 27, 1977, New York Times exposés on newspaper reporters working covertly for the CIA.

gressional intent has been interpreted as excluding the press and publication from the reach of the statutes. *See* Edgar and Schmidt, "The Espionage Statutes and the Publication of Defense Information," 73 Col. L. Rev. 930–1087 (1973).

3. Inadequate Limitations

The Intelligence Committee attempted to alleviate the adverse impact on the First Amendment by adopting language that hinges criminality on a finding that the identification was made "knowingly," with "an intent to impair or impede the foreign intelligence activities of the United States" and "in the course of an effort to identify and expose covert agents." Although the Intelligence Committee meant well, these judgments all are highly subjective, thereby leaving the door open for less cautious officials to level this provision at a broad class of individuals, many acting within the Constitution.

The requisite "intent" can be inferred whenever the publication exposes and thereby diminishes the effectiveness of an intelligence activity. Furthermore, the Department of Justice noted, the intent requirement itself may have "the effect of chilling legitimate critique and debate * * *"

The identification may be "knowing" and yet serve an important social purpose. Clearly, names of agents are often crucial to the meaning of a news story. For example, consider the Washington Post story that the head of the government of Jordan was in the employ of the CIA; the investigative reporter who sought to determine if the Watergate burglars had CIA connections; the publication that Francis Gary Powers was the pilot of the U–2 spy plane. All of these examples could run afoul of the statute.

In addition, it is clear that the name need not actually be revealed to constitute "identifying information." In some circumstances, simply noting the agent's title and location may be sufficient to reveal his identity. Thus, the number of details that must be omitted (and the consequent loss of credibility), is also a vague, expandable concept.

Finally, the concept of "in the course of an effort" offers no real protection. As the Society of Professional Journalists witness noted, "* * * a journalist who is assigned to cover the intelligence community on a regular basis may indeed establish a pattern of reporting the names of agents or sources in the course of legitimate coverage of the CIA."

Furthermore, even if the revelation was a single story, it is not clear that the act of investigating the story and preparing to publish it are insufficient to meet the government's concept of "effort." The Department of Justice repeatedly has emphasized that the "effort" need not consist of a pattern of disclosure but rather, may be simply a pattern of acts with a purpose of disclosing.

4. 501(c): Breadth of Protected Identities

Section 506(4) now defines a covert agent to include not only intelligence officers of employees serving covertly outside the United States, but also anyone who is a "present or former agent of, or a present or former informant or source of operational assistance to an intelligence agency."

"Informant" is defined broadly as "any individual who furnishes information to an intelligence agency in the course of a confidential

relationship protecting the identity of such individual from public disclosure." It is clear, therefore, that thousands of individuals fit this description, and that the bill is primarily a *source* protection bill for the CIA and the FBI.[4] Regardless of the merits of their need for protection, the breadth of the definition broadens the restraint on free speech.

Furthermore, it is not clear that protecting the identity of sources, (who may be in no greater peril than any other law enforcement informants) weighs as heavily against the need for open discussion of American foreign affairs as does the protection of employee identities.

Indeed, the original position of the Attorney General was solely to protect from harm the "men and women who serve our Nation as intelligence officers." Likewise, the FBI Director, in seeking FBI coverage, originally spoke only of "employees."

The Administration's willingness to accept expanded coverage has been accompanied by an equally expandable rationale for the legislation. These shifts have transparently paralleled the changing moods in Congress. The official view now is that the legislation is "critical to the morale and continuity of our intelligence service, to the confidence that foreign sources have in us, and to our ability to protect national security in a hostile world." [5] This expanded purpose should alert us to the danger of future additions to the definition of disclosures that impair American intelligence activities. Congress could criminalize the disclosure of many other matters derived from public information, such as the content of the covert activities themselves, the methods used, and so forth. The fact that those activities may have been in clear violation of American law or policy would be no defense. How will the line be drawn when so much information relevant to public debate arguably could impair or impede intelligence activities or foreign relations or national defense?

4. Changing Administration Position

On January 30, 1980, the witness from the Department of Justice, speaking on behalf of the Administration, testified as follows on H.R. 5615:

> * * * [S]ection 501(b) [now section 501(c)] would create a misdemeanor offense that covers all persons, including those who have never served in the Government and never have had access to classified or inside material of any sort concerning foreign intelligence. Section 501(b) extends to these persons a uniform prohibition against disclosing publicly available information that indentifies a covert agent or source, with the added element that the person must have disclosed it "with the intent to impair or impede the foreign intelligence activities of the United States." * * *
>
> *In proposing a section of such breadth, the House bill marches overboldly, we think, into the difficult area of so-called "born-classified" information,* an area that has not yet been litigated in criminal context. The House provision would cover disclosures of publicly available information made by

[4] See discussion below on the questionable need for coverage of either FBI employees or sources.

[5] Testimony of Robert Keuch, Department of Justice, before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, Aug. 19, 1980.

> ordinary citizens who claim no special expertise in intelligence affairs and have not held special positions of trust nor associated with others who have. . . .
>
> *The scienter requirement*, that an individual must have acted with "intent to impair or impede the foreign intelligence activities of the United States," *is not fully adequate way of narrowing the provision.* First, even such a scienter standard could have the effect of chilling legitimate critique and debate on CIA and other foreign intelligence agencies' policies. . . . Speculation concerning intelligence activity and actors abroad would be seemingly more hazardous if one had ever taken even general position critical of the conduct of our covert foreign intelligence activity. (Emphasis added.)

Subsequently, the House Intelligence Committee adopted amendments to this provision that require the disclosure to be "knowing" and "in the course of an effort to identify" covert agents. While the Department continues to express concern about the chilling effect of the intent test, these additions miraculously have eliminated the Department's constitutional concerns about criminalizing information *not* derived from classified sources i.e. "born-classified" information.

We find the positions of the Department impossible to reconcile. The amendments made no change with respect to the intent test nor with the concepts of "born-classified" information. As discussed above, the amendments create only the most illusory of distinctions between legitimate debate and criminal behavior.

This shifting view on constitutional imperatives is not only without legal merit, it is also irresponsible. As Congessman McClory remarked on a related matter (i.e. whether existing laws provide adequate coverage) to this same witness at the hearing quoted above:

> * * *[W]hat bother me is that we seem to adjust our view with regard to the adequacy of the laws dependent upon political policy statements that are made by the administration or by the President, and today, with a new direction in foreign policy and a new, tougher line as far as strengthening the intelligence community, you and other branches of the executive department are supporting amendments to legislation, including this bill and other bills that we have made reference to.

SECTION 501(C) IS UNNECESSARY

Section 501(c) of the Intelligence Committee bill also is defective and counterproductive because it attacks a phantom problem—private citizens culling through public documents and sources. It thereby diverts attention from the real heart of the problem, which, as CIA Deputy Director Frank Carlucci himself admitted, is "the disclosure of sensitive information based on privileged access * * * by faithless government employees * * *" The Subcommittee bill *does* deal with this real problem, by punishing those employees and former employees who breach their trust by revealing identities or by providing assistance to others in identifying covert agents.

If, indeed, it is possible to glean identities from public information or documents,[6] then it is the responsibility of the CIA and the President to remove those indicators from the public domain and to improve the procedures for ensuring effective cover. Criminalizing disclosures stemming from sloppy secrecy procedures, on the other hand, will only tend to lull the Agency into inaction. Surely if private citizens have been able to infer identities from public sources, so, too, has the KGB.

Both the House and Senate Permanent Select Committees on Intelligence:

> took note of the fact that the identities of American undercover intelligence personnel are not as well hidden as they might be . . . [T]he Committee is aware that intelligence officers have not been provided with credentials and working conditions indistinguishable from certain other departments. The President heretofore has not effectively exercised his power to cause executive departments to provide adequate cover * * * [7]

Accordingly, both Committees adopted a provision (section 503) requiring the President to promulgate procedures that will help to rectify this situation.

We believe this course of action will be more productive and certainly less destructive of free speech.

Coverage of the Federal Bureau of Investigation

As originally proposed, agents' identities' legislation contained no coverage for the FBI. Likewise, the Administration's proposal did not contain this. The coverage was subsequently adopted by the Intelligence Committee, but without benefit of a factual or legal showing that it is necessary.[8] Thus far, this Committee has seen absolutely no evidence that FBI agents and their sources are in the same peril as their CIA counterparts.

In fact, the FBI has advised us that, unlike the CIA,

—they do not have the problem of disgruntled former employees disclosing classified information or assisting others in deducing the identity of covert agents.

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[6] See, for example, the May 14, 1978, article, "How CIA Agents Suffer From Secrecy," Washington Post, by a former CIA official, describing the personal pressures and bureaucratic pitfalls (such as the reluctance of the State Department to cooperate with the CIA in providing cover) that undermine cover.

[7] Senate Report No. 96-896, pages 9-10. See also House Report No. 96-1219 Part 1 at pages 8-9.

[8] According to the Committee Report of the House Intelligence Committee (No. 96-1219 Part 1 at p. 7), "The merits of the inclusion of these FBI personnel were brought out in in an exchange of correspondence between Honorable C. W. Bill Young, a member of the Committee, and Honorable William Webster, Director of the FBI." However, the brevity and lack of substance in that correspondence is noteworthy. Congressman Young simply noted his desire to amend the bill to add FBI undercover agents and informants. The Director stated only:

> As you are aware, in testimony on March 18, 1980 before the House Permanent Select Committee on Intelligence, I suggested that FBI foreign counterintelligence and foreign counterterrorism employees should be afforded the same protection from disclosure as those of the Central Intelligence Agency (CIA) and Department of Defense intelligence components. We readily recognize that the CIA has been most seriously affected by these disclosures and the FBI strongly supports any measure that would prohibit the continuation of these disclosures. We believe, however, that the damage to the national security could be just as great if FBI or other intelligence sources were willfully disclosed.

The testimony alluded to by Director Webster was no more illuminating as to the specific need for FBI coverage.

—they do not have the problem of publicly available documents (comparable to the State Department's Biographic Register) from which FBI agent identities can be gleaned.
—they have only a handful of employees who ever operate covertly outside the United States.
—there is a significant overlap in the utilization of employees and sources in both domestic and foreign investigations. That is, the same agents or sources may work in both domestic and foreign counter-terrorism investigations. The bill would create the anomaly of criminalizing agent disclosure in the context of one investigation but not another, even where risk to life may be greater in the domestic case.
—most sources used by the FBI in foreign counter-intelligence and foreign counter-terrorism investigations are American citizens residing and operating within the U.S. Thus, the protection of the police power of this nation is available. These sources are no more vulnerable than any other informants that cooperate with the FBI, DEA, or even the Metropolitan Police. That is not to say that the risk is not significant. It must be minimized through appropriate secrecy procedures. But in determining whether or when to impose criminal penalties for disclosure, we must act cautiously.
—no disclosure has been made which would constitute a violation of this bill.
—no harm has befallen an FBI employee or sources as a result of a disclosure prohibited by this bill.

In sum, as of this time, the case has not been made for FBI coverage under this bill. That is not surprising, since H.R. 5615 was intended to protect the CIA, not the FBI. The FBI was added on as a kind of after-thought, without the benefit of searching examination by the Intelligence Committee or any consideration by the Committee with FBI oversight and legislative responsibility. Accordingly, we believe it would be more appropriate for this Subcommittee to consider the FBI's need separately.

Conclusion

Never before has a criminal sanction been attached to this kind of speech. The CIA insists that it is necessary, but it is the responsibility of Congress, as well asthe courts, to determine whether such a measure is constitutional or whether a less onerous alternative will deal adequately with the problem.

Ultimately, it is the respect and protection we afford free speech that distinguishes this country from the nations within which the CIA secretly operates. If a free society is sacrificed for a better intelligence system, we have compromised our very goal.

Robert F. Drinan.
John Seiberling.
Don Edwards.
Peter W. Rodino.
Elizabeth Holtzman.
Bob Kastenmeier.

ADDITIONAL VIEWS OF MESSRS. McCLORY, HYDE, ASHBROOK, AND SENSENBRENNER

H.R. 5615, as reported by the Permanent Select Committee on Intelligence, was referred to this Committee pursuant to Rule XLVIII to afford us the opportunity to consider the First Amendment questions that have been raised in connection with the bill and the advisability of including certain individuals connected with the FBI among the "covert agents" whose identities are protected. After careful consideration of these complex and delicate issues, we voted with the overwhelming majority of the Committee to favorably report H.R. 5615 in the form in which it was sequentially referred to us. We believe that that version of the bill is workable, efficacious and constitutional. For this reason, we successfully opposed amendments to: (1) remove Section 501(c) of the bill, (2) remove the FBI from the purview of the bill, (3) exclude from the offenses created under the bill disclosure of information by an individual that solely identifies himself as a covert agent, and (4) include among the defenses applicable to Section 501(c) that the defendant knew from other than classified information the covert status of the individual whose identity is disclosed.

H.R. 5615, as reported by this Committee and the Intelligence Committee, amends the National Security Act of 1947 to prohibit, under certain circumstances, the unauthorized disclosure of information identifying certain U.S. intelligence officers, agents, informants, and sources. We believe that legislation of this nautre is imperative. Testimony received by both Committees reveals widespread discolsures of the identities of our covert agents by callous individuals devoted to subverting our intelligence efforts with horrendous effects on our national security. Although some involved in these efforts have been former government employees with access to classified information, the numerous incidents involving individuals who have not occupied that particular position of trust are alarming. Irrespective of the source, these disclosures create serious morale problems within the intelligence agency, discourage potential sources of information, and rob our foreign policy and national defense efforts of essential information. Of course, the most widely publicized result of these disclosures has been the loss of life, limb and property by agents and their families. We do not agree with the suggestion of some that efforts to enact this bill into law expeditiously are a "hysterical" reaction to a recent brutal attack of that nature. Legislation of this type should have been passed long ago.

Conspicuously absent from any testimony received by either Committee was any mention of a situation where the revelation of an agent's identify had a desirable effect. Although there was speculation about situations where it might be necessary, no persuasive example was ever given and we doubt that one exists. Thus, these disclosures have well-documented, disasterous effects, with no balancing advantages.

Section 501 of the bill which we favorably reported sets out three criminal offenses for the intentional disclosure to unauthorized persons of information identifying covert agents. The severity of the penalty is directly proportional to the connection between the individual's security clearance and his ability to identify a covert agent. By contrast, the elements of proof are inversely proportional.

Under Section 501(a), an individual who has or has had authorized access to classified information that identifies a "covert agent" is subject to a fine of $50,000 and/or 10 years imprisonment if (1) he intentionally discloses, to any individual not authorized to receive classified information, any information identifying such agent, (2) knowing that the information disclosed identifies such agent, and (3) knowing that the United States is taking "affirmative measures" to conceal the agent's intelligence relationship to the United States. Although the agent's identiy must be classified, the actual information disclosed which identifies him need not be.

Section 501(b) contains the same requirements, but it applies to those who learn the identity of a covert agent "*as a result of* having authorized access to classified information." The distinction between this offender and the offender under Section 501(a) is that the latter must have had authorized access to specific classified information which identifies the covert agent involved. The penalty for this offense is $25,000 and/or 5 years imprisonment.

Under Section 501(c), authorized access to classified information is not a prerequisite to conviction. Like subsections (a) and (b), the Government must provve that the disclosure was intentional, that the covert relationship was classified and that the offender was aware that the Government was taking affirmativve measures to conceal the agent's relationship. Similarly, the information disclosed need not be classified. However, Section 501(c) is more demanding in that the prosecution must also prove that (1) the disclosure was made "in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States", and (2) the specific disclosure involved was made with such an intent.

This Committee further endeavored in Section 502 to restrict the scope of the bill by (1) making it a defense to prosecution that the United States had publicly acknowledged or revealed the intelligence relationship to the United States, (2) restricting prosecution upon theories of aiding and abetting, misprison of felony, or conspiracy to situations where the offender "acted in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the U.S.," (3) making evidence of intentional disclosure alone insufficient proof of an intent to impede U.S. intelligence activities, and (4) permitting a disclosure avenue for whistleblowers by exempting from Section 501 the transmission of any such information to the Senate and House Intelligence Committees. Section 505 emphasizes that no provision may be relied upon as authority to withhold information from Congress.

We strongly support the Committee's decisions to retain Section 501(c) of the bill and to exclude the "Aspin" defense that the offender learned of the covert relationship through non-classified means. We

concur with the testimony received by the Subcommittee on Civil and Constitutional Rights that "a statute in this area, if it is to be effective, must also cover those who have not had an employment or other relationship of trust with the United States involving authorized access to classified identities information" and that the "Aspin" defense ' would render 501(c) practically nugatory in terms of that which we want to achieve." Despite the fact that there is "no issue . . . more on the minds of staff employees of the Central Intelligence Agency" than identities disclosure, that Agency advises that it would "lose interest in this bill" if the "Aspin" defense were included.

We are not unmindful of the First Amendment concerns in this area. The "clear and present danger" which H.R. 5615 is designed to remedy is the adverse effect of these disclosures which occurs irrespective of the source of the information (*i.e.*, classified vs. unclassified) or the livelihood of the discloser. Certainly, the First Amendment requires us to achieve this goal by the most narrow means possible. We need not, however, design our means so narrowly that the remedy itself is destroyed. To delete Section 501(c) or to provide as a defense to prosecution thereunder that the covert identity was discovered through non-classified information would have this effect.

We believe that Section 501(c) has been narrowly drawn with First Amendment concerns in mind. In order to prevent its application to conscientious journalists and "whistleblowers," it requires that the disclosure be made: (1) with the intent to impair or impede the foreign intelligence activities of the United States, (2) in the course of an effort to identify and expose covert agents engaged in with that same intent, (3) with knowledge that the information disclosed identifies a covert agent, and (4) with knowledge that the United States is taking affirmative measures to conceal the agent's intelligence relationship to the United States. Even where all of these elements are present, an individual has not committed an offense under this Section if the U.S. has publicly acknowledged or revealed the intelligence relationship or if the information is transmitted to the Senate or House Intelligence Committees. Finally, proof of an intentional disclosure is not in itself sufficient proof of the requisite intent to impair U.S. intelligence activities. This lengthy list of elements of the offense will confine prosecutions to the most egregious cases. Those who fall within its purview merit the imposition of criminal penalties.

We also support the Committee's decision to retain the coverage of the FBI within the bill. The need for this coverage was eloquently described by the Director of the FBI to the Chairman of the Subcommittee in a recent letter. He remarked:

> While we recognize that the CIA has, to date, been the agency most seriously affected by disclosure of identities, we believe that the sensitivities involved are just as great for the FBI and other U.S. intelligence agencies as for CIA and Department of Defense as the original legislation provided. Rather than wait for disclosure of the identity of an FBI employee or source to occur with consequent harm, FBI related individuals working in the foreign counterintelligence and international terrorist fields should be included within the terms of the Act now.

Again, the bill is narrowly drawn to include only those associated with the FBI who are most subject to danger from these regulations: (1) employees of the FBI's foreign counterintelligence and foreign counterterrorism components whose identity is classified and who are serving outside the U.S. at the time of the disclosure or within 5 years prior thereto, (2) U.S. citizens whose identities are classified and who, at the time of the disclosure, are acting as "agents of" or "informants to" the FBI's foreign counterintelligence or foreign counterterrorism components, and (3) non-U.S. citizens who are present or former agents of or informants to the FBI's foreign counterintelligence and foreign counterterrorism components whose identity is classified. These parameters include, for instance, KGB double agents operating in the United States, but exclude infiltrators of exclusively domestic organizations. We do not believe that the FBI should wait for the protections of this bill until a "bloody body" is discovered.

A final change in the bill which we successfully opposed would have permitted an agent to reveal his own covert status. Although the agent subjects himself to the risk of retaliatory measures in making such a disclosure, his safety is not the only interest that the bill is designed to protect. The damage to our national security interests is the same, irrespective of the identity of the discloser. Furthermore, such a revelation may, by implication, cast a shadow on other covert agents. As a result, the agent himself should be equally subject to penalties. Like any other defendant prosecuted under the bill, he would have access to the two Intelligence Committees if the need arose to "blow the whistle."

Presented with the most difficult test of balancing our essential national security interests in effective and secure intelligence efforts, against the precious First Amendment rights of free speech and press, this Committee and the Permanent Select Committee on Intelligence have reported a bill that protects both with no unconstitutional infringements on civil liberties. Because of its importance, we hope that H.R. 5615 will be promptly enacted into law.

HENRY J. HYDE.
JAMES SENSENBRENNER.
ROBERT MCCLORY.
JOHN M. ASHBROOK.

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